

Tilburg University

The Netherlands (Chapter 1)

Verschuuren, J.M.

Published in:
The role of the judiciary in environmental governance

Publication date:
2009

Document Version
Early version, also known as pre-print

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):
Verschuuren, J. M. (2009). The Netherlands (Chapter 1). In *The role of the judiciary in environmental governance: Comparative perspectives* (pp. 55-83). (Energy and environmental law & policy series; No. 4). Wolters Kluwer Law & Business.

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

The Role of the Judiciary in Environmental Governance in The Netherlands

Jonathan Verschuuren^{*}

1. Introduction

Although Dutch administrative courts are considered to only test government decisions in a marginal way, and despite the abolishment of the *actio popularis* in 2005, the judiciary does play a central role in environmental governance. The fact that EU environmental law is of huge importance in day-to-day decision-making in the Netherlands is almost entirely due to the judiciary. Thanks to an efficient court system that grants sufficient opportunities to companies, NGOs, and individual citizens, many environmental cases are decided in this country, much more than in all other countries in the EU. These are some of the remarkable findings that will be discussed below.

2. Environmental issues and environmental governance structures

2.1 Environmental issues

With 16,4 million people living on only 41,029 km², the disruption of the environment and especially nature is enormous. Construction and operation of industries, railroads, airports etc. not only cause stress on the available space, but also on nature and the environment. The Netherlands Environment Assessment Agency publishes annual reports on the state of the environment in the Netherlands.¹ These reports show that following are the most important sources of environmental degradation in the Netherlands:

- Industry. The Netherlands are a heavily industrialized state, with large scale chemical industries. Especially refineries and energy industry cause many environmental problems. During the period 1980-1990 the most pollutive industries have, however, heavily invested in environmental protection measures. Attention therefore shifted to other sources of environmental degradation, although some attention is now being paid to industry again as a consequence of the issue of climate change.
- Traffic and transport. Since the Netherlands, because of its situation at the Rhine estuary and the North Sea, are an important transit route to Germany, especially infrastructure has extensively been developed. This goes for transport by air, by ship and by road. The increasing mobility has led to an increase of the use of private cars and to an increase of air traffic. Since 2005, air pollution as a consequence of traffic, is considered one of the major environmental problems, especially because of the negative impact on people's health.

^{*} Prof. dr. Jonathan Verschuuren is professor of European and International Environmental Law at the Centre for Legislative Studies, Tilburg University, Netherlands. Parts of this chapter have been previously published in J. Verschuuren, 'The Netherlands' in *Access to Justice in Environmental Matters and the Role of NGOs. Empirical Findings and Legal Appraisal*, N. de Sadeleer, G. Roller and M. Dross (eds) (Groningen, Europa Law Publishing, 2005), pp. 97-117.

¹ Each year, the agency produces the Nature Balance and the Environmental Balance, to be found at the agency's website at <www.mnp.nl>, 7 December 2007.

- Agriculture. Due to a substantial greater input of nutrients, pesticides, energy and (ground)water and due to the development of new techniques in farming and livestock breeding, agricultural production has risen to enormous amounts. Agriculture in the Netherlands is the most intensive one in Europe, and especially has a negative impact on flora and fauna.

According to the 4th National Environmental Policy Plan, the seven most important environmental problems in the Netherlands are:²

1. Loss of biodiversity. Many plant and animal species are severely threatened by habitat fragmentation, often as a consequence of infrastructure projects, and by the consequences of intensive forms of agriculture (such as land parcelling and the application of pesticides and fertilizers).
2. Climate change. Industry and traffic are the most important sources of greenhouse gas emissions. Global climate change causes wetter and milder winters in the Netherlands, as well as periods of extreme rainfall, resulting in flooding. With almost half of the country lying below sea level, sea level rise and increased storm activity, are of concern to the Netherlands as well.
3. Over-exploitation of natural resources. Current production and consumption patterns in the Netherlands lead to environmental pressure abroad, especially in developing countries.
4. Threats to human health. Hazardous substances in the environment cause threats to human health, some of which have not yet been mapped out properly.
5. Threats to external safety. The use, storage and transport of hazardous substances in a densely populated country like the Netherlands leads to a high risk level of accidents.
6. Damage to the quality of the living environment. Excessive exposure to air pollution and noise leads to a decline of the quality of living.
7. Possible unmanageable risks. Rapid technological developments, such as GMOs and nanotechnology, may be the cause of the, yet unknown, environmental problems of tomorrow.

2.2 Principal environmental laws³

Environmental law has its foundation in the Dutch Constitution. Art. 21 of the Dutch Constitution charges the Government with the duty to care for the protection and improvement of the environment.⁴ The government has, until now, fulfilled this task mainly by issuing legislation. One of the main sources of Dutch law, therefore, is statutory law. This does not only include formal legislation (legislation by government and parliament), but also regulation by

² This plan can be downloaded from the website of the Dutch Ministry for the Environment at <www2.vrom.nl/pagina.html?id=7377>, 7 December 2007.

³ For a more extensive overview of Dutch environmental law and policy, see E. Bohne, *The Quest for Environmental Regulatory Integration in the European Union* (The Hague, Kluwer Law International, 2006), pp. 293-332, and J. Verschuuren, 'Environmental Law' (Chapter 18) in *Introduction to Dutch Law*, E.H. Hondius (ed) (4th edn, The Hague, Kluwer Law International, 2006), pp. 369-397, and

⁴ See J. Verschuuren, 'The Constitutional Right to Protection of the Environment in the Netherlands' (1993) 46 *Austrian Journal for Public and International Law*, 67-77 and (same author) 'The constitutional right to protection of the environment in the Netherlands' (1994) *Revue Juridique de l'Environnement*, 339-347.

decentralized bodies (provinces, municipalities) and delegated legislation at the level of the central government (ministerial ordinances). Dutch environmental law is largely influenced by EU law. Apart from statutory law, self-regulation has become more important over the last two decades. This means that instruments like covenants have become rather important as sources of law, while industries have gained more freedom and responsibility in obeying environmental rules when voluntary environmental management systems are in place.⁵

Dutch environmental legislation has for a long time been dominated by “sectoral” acts: one act for every kind of pollution (i.e., one for noise, one for air pollution, one for pollution by waste and another for pollution by chemical waste etc.). Since the 1980s, however, the strong tendency towards an overall environmental policy has had its reflection on legislation as well. The most important environmental act nowadays is the Environmental Management Act (hereinafter: EMA). This Act incorporates matters of procedure that used to be dealt with in sectoral acts. The EMA contains rules on the application and granting of permits for installations, environmental impact assessment, waste, environmental planning, environmental quality standards, general provisions concerning appeal and enforcement of environmental law, financial provisions, provisions on emissions trading, etc.

The EMA has not resulted in the total integration of environmental legislation. Although the EMA covers a very considerable area of environmental law, it does not regulate the latter in its entirety. There exist a number of laws in addition to the EMA, such as the Soil Protection Act, the Air Pollution Act, the Nuclear Energy Act, the Pesticides Act, the Nature Conservation Act, and the Flora and Fauna Act. Although they were, generally speaking, considerably reduced by the adoption of the EMA, these laws continue to regulate a number of major subject areas.

In 2009, the environmental permit system will be further integrated by the Environmental Law (General Provisions) Act.⁶ When the Act takes effect, a total of 25 permits, ranging from the permit under the EMA to the building permit and the mining permit, will be procedurally integrated. A person who initiates a project that is regulated under more than one statute, will only be sending one digital permit application to one authority (“one shop stop”). This authority will then make sure that all procedures under each relevant statute are carried out by the various competent authorities (in case there are multiple competent authorities).

Another important and complex integration project is the integration of a number of statutes relating to water issues (marine and fresh water, groundwater and surface water, as well as statutes dealing with the protection against flooding) into a new Water Act. Under this new statute, six permits regulating water issues will be integrated into a single water permit.⁷ The Water Act will probably take effect in 2009 as well. The integration of the water permit and the new integrated permit under the Environmental Law (General Provisions) Act is not being considered in order not to overcomplicate both legislative projects.

2.3 Institutions and governance structures

⁵ See R. Seerden, ‘Legal Aspects of Environmental Agreements in the Netherlands, in Particular the Agreement on Packaging and Packaging Waste’ in *Environmental Contracts. Comparative Approaches to Regulatory Innovation in the United States and Europe*, E.W. Orts and K. Deketelaere (eds) (The Hague, Kluwer Law International, 2001), pp. 179-197.

⁶ For the text of the Bill and further information on this project, see the special website of the Ministry of the Environment at <omgevingsvergunning.vrom.nl>, 10 December 2007 (in Dutch), as well as some additional information in English at <international.vrom.nl/pagina.html?id=11102>, 10 December 2007.

⁷ More information on the Water Act, including the text of the Bill, can be found a special website, that is partly in English, at <www.helpdeskwater.nl/waterwet/english_version/water_act>, 10 December 2007.

Responsibility for national environmental policy in the Netherlands rests with four Ministers. The first responsible minister for environmental matters is the Minister of Housing, Spatial Planning and the Environment. Besides the fact that the main responsibility for environmental policy rests with this minister, he has to co-ordinate the environmental policies regarding

- traffic and water management, for which the Minister of Transport, Public Works and Water Management is responsible,
- pollution by the agricultural sector and the conservation of nature, for which the Minister of Agriculture, Nature and Food Quality is responsible, and
- energy, for which the Minister for Economic Affairs is responsible.

The implementation of environmental policies and law takes place at provincial and municipal level, i.e., by provincial and municipal administrative authorities.⁸

3. Overview of the court system in the Netherlands

3.1 Introduction

Most environmental matters fall within the scope of administrative law, for which the General Administrative Law Act (hereinafter: GALA) gives procedural rules. However, NGOs and citizens also have the possibility to initiate court proceedings under civil law and under criminal law. For most administrative law cases, there are administrative sectors within the District Courts, with the possibility of appeal to the Administrative Law Division of the Council of State. However, until 2009, in almost all environmental cases, legislation provides for immediate appeal with the Administrative Law Division of the Council of State (i.e., appeal in one instance). When the Environmental Law (General Provisions) Act will have taken effect (in 2009), decisions taken on the basis of the statute can be addressed by courts in two instances, pursuant to regular administrative law. Civil and criminal law cases can be addressed in three instances. Decisions of the District Courts (both in tort and criminal cases) can be reviewed by Courts of Appeal. The Supreme Court can be addressed for a cassation procedure (only in civil law and criminal law cases). In this section, the possibilities to address either of these sectors in environmental matters will be discussed. I will also briefly show that non-judicial procedures exist as well.

3.2 Procedures before administrative courts

In this section, procedures before administrative courts are discussed. Until 2005, environmental permits, i.e., the integrated permit on the basis of the EMA, as well as other permits, such as the permit on the basis of the Pollution of Surface Waters Act (PSWA), were granted applying the extensive public preparation procedure (Section 3.5 of GALA). Other decisions were usually taken applying the public preparation procedure (Section 3.4 GALA). As a consequence of a strong call for deregulation, in 2005, the public preparation procedure and the extensive public preparation procedure have been integrated (into a new Section 3.4, the uniform public preparation procedure).⁹ First, I will go into the discussions leading to the integration of both

⁸ For an extensive overview of the governance structure and the administrative style in the Netherlands, see Bohne, *supra* note 3.

⁹ *Staatsblad* [Bulletin of Acts and Orders] 2002, 54.

preparation procedures and its most important consequence: the limitation of access to courts in environmental matters (3.2.1), after which I will discuss the principal characteristics of the remaining opportunities to go to an administrative court (3.2.2).

3.2.1 The abolishment of the *actio popularis*: from ‘anyone’ to ‘interested parties’

Decision-making processes on applications for all environmental permits are regulated by the uniform public preparation procedure. According to Art. 8.1 of the EMA it is forbidden to set up, operate or change the set up or operation of an installation unless one has a permit to do so (installations that might have adverse impacts on the environment). A company has to apply for such a permit with the competent authority. The uniform public preparation procedure applies to these permits, as well as to several other decisions (for instance permits to discharge waste into surface waters). After the application and the draft-decision have been published *anyone*, as well as advising bodies, such as the Inspectorate for the Environment, can bring forward written or oral objections. The term ‘anyone’ implies that all groups of citizens and environmental NGOs, as well as non-interested individuals have a right to participation in environmental decision-making with regard to permits. There is no need to show special interest in this procedure. The final decision has to show that the objections have been taken into consideration.

When the uniform public preparation procedure has been attended, there is no need to object to the same administrative authority, but instead one can address an appeal to the Administrative Law Division of the Council of State directly. This right, however, is reserved for *interested parties*, being those people that can show a special interest in the decision. Note that this differs from the public participation phase that is open to anyone. It is general accepted case-law that environmental NGOs are considered to have an interest in most environmental matters.

Before the 2005 change of the legislation,¹⁰ there existed a so-called *indirect actio popularis* in Dutch administrative environmental law. Once a person or a group of people or NGO had entered the decision-making process, they had a right to go to court as well, as long as they object on the grounds put forward by them in the decision-making process. They were not allowed to introduce new arguments in court. In 2005, Parliament accepted the proposal to abandon the *actio popularis*.¹¹ As a consequence, only interested parties are allowed to go to court. Two important additional procedures that were open for anyone have been limited to interested parties as well, i.e., the right to request to update or withdraw the permit, when this is necessary to protect the environment (Art. 8.22vv EMA), and the right to ask an administrative body to take enforcing measures when they feel the authority is in default of doing so (Art. 18.14 EMA). The decision upon such requests can be reviewed by the judiciary. This has, after having existed for more than 25 years (since 1979), ended the *actio popularis* in the Netherlands. The Cabinet thought it was no longer justified to have a special regime for environmental matters, although they admitted that the abolishment of the *actio popularis* would probably not reduce the number of court cases much, since research showed that usually only interested persons object against a decision anyway.¹² Non-interested persons do not seem very interested! Still, the Cabinet argued that in times of deregulation and decreasing administrative burdens such as these,

¹⁰ *Staatsblad* [Bulletin of Acts] 2005, 282.

¹¹ *Kamerstukken* [Parliamentary Documents] II, 2003-2004, 29 421.

¹² A.A.J. de Gier, J. Robbe, Ch.W. Backes and P.J.J. van Buuren, *De actio popularis in het ruimtelijke ordenings- en milieurecht* (Utrecht, Utrecht University, 1999).

maintaining an *actio popularis* would give the wrong signal to society.¹³ In general, it is often thought that court procedures, especially those instituted by NGOs and individual citizens, are time and money consuming. The national government that was installed following the May 2002 elections took this view: “It has become easier to obstruct decisions than to take a decision; as a consequence, public authorities often cannot solve social problems. The Cabinet will look into proposals to (...) streamline procedures and abolish the so called *actio popularis*, in order to increase decisiveness of the authorities”.¹⁴

The proposal to abandon the *actio popularis* met a lot of criticism. Some feared an increase of the administrative burden, because now competent authorities as well as courts, in each and every case have to decide whether or not the applicant is an interested party.¹⁵ In addition, the change of legislation might be seen as contrary to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.¹⁶ Although the Aarhus Convention does not explicitly necessitate an indirect *actio popularis*, it still is rather odd to reduce access to justice in environmental matters, where the Aarhus Convention in its preamble clearly states that access to justice must be improved. Some even argued that, once someone has entered the participation process, he or she becomes a member of the ‘public concerned’ and gets ‘sufficient interest’ as meant in Art. 9(2) of the Aarhus Convention, thus allowing this person to go to court. This line of reasoning cannot only be found in literature,¹⁷ but is in the UN/ECE ‘Aarhus Implementation Guide’ as well.¹⁸

In Parliament it was even suggested to drop the presumption that environmental NGOs have an interest when the environment is at stake.¹⁹ A few authors and politicians claimed that NGOs should not have access to justice, not even in administrative law cases, because NGOs have no direct interest in environmental matters. The decision to grant an environmental permit to an industrial plant is a matter between the competent authority and the company that applied for the permit and, possibly, one or two people living close to the plant. NGOs should only be able to interfere with the political process, for instance by urging the city council to look into the decision of the competent authority. Courts should not be able to annul a decision taken by a democratically legitimised public authority following arguments of a non-democratically legitimised NGO.²⁰ The latter suggestion has not been adopted by the legislature, as it would clearly violate both the Aarhus Convention and the EU Directive implementing the Aarhus

¹³ *Kamerstukken* [Parliamentary Documents] II, 2003-2004, 29 421, No. 3, p. 4.

¹⁴ *Regeerakkoord* [Coalition agreement] of 3 July 2002, at p. 24, available at the website of the Ministry of General Affairs at <www.minaz.nl/Onderwerpen/Regeringsbeleid/Regeerakkoord/Regeerakkoord_2002>, 7 December 2007.

¹⁵ J.C.A. de Poorter, ‘Van actio popularis naar kringen van belanghebbenden’ (2006) 43 *Bouwwrecht*, 312.

¹⁶ (1999) 38 ILM 517. In April 2004, the ratification process of the Aarhus Convention was well under way (*Kamerstukken* [Parliamentary Documents] II, 2002-2003, 28 835, Nos. 1-2), see J.M. Verschuuren, ‘Internationaal milieurecht en de Awb’ in *De grootste gemene deler. Opstellen aangeboden aan prof.mr. Th.G. Drupsteen* (Lurks et al) (Deventer, Kluwer, 2002), pp. 235-244.

¹⁷ F. de Lange, ‘Beyond “Greenpeace”, Courtesy of the Aarhus Convention’ (2003) 3 *Yearbook of European Environmental Law*, 239.

¹⁸ S. Stec, S. Casey-Lefkowitz, and J. Jendroska, *The Aarhus Convention: An Implementation Guide* (New York, United Nations, 2000), p. 108.

¹⁹ J.M.H.F. Teunissen, ‘De algemeen belangorganisatie als bestuursrechtelijk (pseudo-)Openbaar Ministerie?’ (2003) *Gemeentestem* No 7179.

²⁰ For example: J. Teunissen, annotation under Administrative Law Division of the Council of State, 13 November 2002, (2003) *Gemeentestem* No 7177, 29.

Convention in the EU.²¹ Both state that environmental NGOs, that fulfil certain conditions, are considered to have an interest in environmental matters. In addition, standing for environmental NGOs is often considered to be a consequence of the constitutional right to environmental protection, mentioned above. The large number of cases that is won by NGOs in environmental cases against public authorities shows that public authorities are not always inclined to apply environmental legislation correctly. Therefore, NGOs play an important role in environmental governance.²² Additionally, abolishing the right for NGOs to go to court in administrative law, would probably lead to the same number of court procedures, this time initiated by directly involved individual citizens that take up positions prepared by NGOs.²³ From a legal point of view, the separation between a group of local citizens that have joined forces in an association and NGOs is not very sharp. Courts, in each and every case, will have to go into the matter of admissibility, which, in turn, leads to delays. Also, the number of tort procedures was expected to increase after decreasing the access to justice in administrative law.²⁴

3.2.2 Procedures against environmental decisions since 2005

Since the abolishment of the *actio popularis* in procedures against environmental permits, standing requirements for all environmental decisions are more or less the same, since the uniform public preparation procedure applies to most decision-making processes, such as permits on the basis of environmental law, nature protection law, and construction law, environmental ordinances, and decisions on administrative enforcement. Sometimes there are specific processes, not included in the GALA. There are differences between the procedures leading to the various decisions, depending on which Act has to be applied, but in almost all of these cases interested parties have a right to participate in the decision-making.

After an environmental decision has been taken, one has the right to lodge a notice of objection against this decision. When the uniform preparation procedure has been followed, any person has a right to raise objections (Art. 13.3 EMA in conjunction with Art. 3:15 GALA). The objection has to be made to the same administrative authority that took the original decision. After the notice of objection is received, the issuer of the notice and possible other parties concerned get the opportunity to be heard. The administrative authority determines whether or not the complaints are well-founded. If the administrative body agrees with the raised objections, they can overrule the original decision and take a new decision which gives (partly) in to the objections. No fee may be asked by the administration. Judicial assistance is not needed. This means that in most cases the expected costs do not stand in the way of the participation in or the start of a procedure.

As stated above, an appeal against the decision on this objection can only be lodged by a party whose interest is directly involved with the environmental decision. Legal entities have an interest if they protect the interest concerned on the basis of their aims and actual activities. Art. 1:2(3) GALA states: 'As regard legal persons, their interests are deemed to include the general and collective interests which they specially represent in accordance with their objectives and as

²¹ Directive 2003/35/EC providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes relating to the Environment and Amending with Regard to Public Participation and Access to Justice Council Directives 85/337/EEC and 96/61/EC, OJ L156/17, 2003.

²² M.P. Jongma, F.C.M.A. Michiels, 'Het beroepsrecht van milieu-organisaties moet blijven!' (2002) *Nederlands Juristenblad*, 2238-2239.

²³ Ibid.

²⁴ Ibid.

evidenced by their actual activities.’ In general, case-law shows that courts are rather lenient towards NGOs when applying this clause.

The appeal must be addressed to the Administrative Law Division of the Council of State in case of decisions on the basis of the EMA and Acts mentioned in Art. 20.1 EMA.²⁵ Appeal against a few other decisions, for instance on the basis of the Flora and Fauna Act, must be addressed to the administrative sector of the competent District Court. In these cases, after appealing to the District Court, higher appeal usually is possible with the Administrative Law Division of the Council of State. As already mentioned above, as of 2009, the latter system of appeal in two instances will be applied to permits granted under the new the Environmental Law (General Provisions) Act as well.

The Council of State has very extensive powers, since it can, besides squashing a decision to grant a permit, also take a new decision if it decides the case is clear enough to do so. Otherwise it can rule that the administrative body has to take a new decision. It can also change some of the conditions attached to the permit, or draw up new ones. In some cases compensation for damages can be awarded. However, it must be noted that usually the Administrative Law Division of the Council of State only tests government decisions in a rather marginal way. Allegations by administrative bodies that administrative courts sometimes show ‘legal activism’ are taken seriously, both by the legislator (deregulation!) and by the courts. This means that the Administrative Law Division of the Council of State usually annuls a decision on formal grounds, leaving the administrative authorities the possibility to adopt a new decision, but only after having gathered more or better information concerning the relevant facts and interests to be weighed.

These procedures are characterised by low costs. Although parties can be held liable for procedural costs, they do not have to provide for financial security. The final decision, including judicial review, usually takes up to 1 or 1,5 years maximum. Judicial assistance is not obligatory and there are no strict formal rules for the formulation of complaints or letters of appeal. There are government financed bureaus of legal aid, some of which are specialized in environmental matters. They especially assist local and regional environmental organisations.

It must be noted, however, that there various decisions against which no appeal is possible. These include all forms of legislation, including orders in council, ministerial orders and also national environmental policy plans. Since in many cases environmental permits have been replaced by general rules for certain categories of installations, laid down in orders in council (75% of all installations no longer need a permit), this can be criticised from the point of view of access to justice.

Finally, it is important to know that, since 1992, the already existing Legal Aid Service Centres had been armed with environmental lawyers to give individual citizens and NGOs that could not afford legal assistance legal advice. They could even represent them in court, if it should come to that. However, to reduce costs involved in legal aid in the Netherlands, the system of environmental legal aid had been decreased considerably by 2005. Presently, there still remain a few centres that provide legal aid in environmental matters, although not entirely for free.²⁶

3.3 Procedures before civil courts

²⁵ I.e., Nuclear Energy Act, Noise Abatement Act, Groundwater Act, Air Pollution Act, Pollution of Surface Waters Act, Pollution of the Sea Act, Chemical Substances Act, Soil Protection Act, Antarctic Protection Act.

²⁶ See the centres’ website at <www.milieurechtshulp.nl>, 7 December 2007

Activities causing environmental harm can be unlawful under the general law of torts. Any individual who claims to be the victim of a wrongful act has access to justice in civil cases: his or her specific interest is injured. The Dutch Civil Code contains an Article that deals with group actions. The legal requirements for admissibility of organisations in civil law proceedings are being a legal person, having relevant objectives under the articles of association and whose members have similarity of interests (Art. 3:305a). Environmental NGOs explicitly fall under the scope of this article. The State has access when a private party commits a wrongful act against the State, and if the civil action against that private party doesn't violate the rules for compliance as laid down in basic public law. As mentioned above, any individual citizen as well as environmental organisations can request the competent authority to enforce environmental legislation.

The Dutch Civil Code contains two kinds of foundation for the requisition of environmental damage: personal liability on the basis of a wrongful act and qualitative liability. Whether or not there is a matter of personal liability is being determined by applying the general law of torts (Art. 6:162). The essential requirements for the successful application of the Article concerned are unlawfulness, accountability, damage and a causal connection between unlawful actions and the damage. There is unlawfulness in case of a breach of (subjective) rights, when the action or omission violates legal duties or when there is a violation of unwritten law or failure to take due care. The qualitative liabilities in the Dutch Civil Code are the liability for dangerous substances, the liability of the owner of a waste disposal site and of the operator of a drill hole (Art. 6:175/177). In cases of environmental damage it is very often hard to point out exactly who caused the damage. In those cases case law assumes the most likely responsible party to be primarily responsible party. In such a case, it is up to him to prove someone else caused the damage. When there are more responsible parties, each of them is liable for a proportionate part of the damage and they may be held jointly and severally liable for the damage.

Individuals, NGOs and the State can ask for a judicial injunction or prohibition. This is possible in the situation of an (impending) breach of right or of law. Individuals and the State can also ask for compensation of the damage they suffered. NGOs cannot ask for (financial) compensation for damage to the environment in general, i.e., *res nullius* or *res communes omnium*. The costs made to restore or to prevent damage can be eligible for compensation if the claimant can show an interest (this may be an environmental organisation as well). These are costs the claimants made themselves to restore or prevent damage to the environment (e.g., clean-up costs). This is mostly damage to persons or objects and thus 'easy' to establish. But when restoration in the old situation or the creation of an equal situation is not possible, suchlike pure ecological damage will not be eligible for legal compensation, at least it has not been awarded until now. In Art. 3:305a(3) of the Civil Code this explicitly has been laid down for tort actions initiated by NGOs.

The above also applies to governmental decisions. NGO's sometimes start a tort procedure when they feel that a governmental body violates legal duties, for instance international or EU law. In cases where administrative courts have no legal jurisdiction, the civil court can function as 'a way out'. When factual acts, juridical acts under private law or from appeal excluded decisions (such as regulations from decentralised authorities, orders in council, etc.) are legally questionable, one can go to the civil sector of the District Court if it is a matter of tort. An individual or an organisation has to prove that the administrative authority has

committed a wrongful act against them by the action concerned. A famous example in Dutch case law will be discussed in section 4 below.

The costs of proceeding before a civil court are rather high in the Netherlands. In civil procedures parties are obliged to get legal representation before the court: they cannot be their own attorney. These costs are usually rather high. Moreover, the party who loses the case, also risks to pay for the costs of the counter-party. This risk keeps a lot of people from proceeding in – rather insecure – environmental liability procedures, especially the not so rich environmental organisations will think twice before going to court. Besides that, a procedure can take very long as it goes before three instances. So it can take from a few months up to a few years to get a final judgement.

3.4 Procedures before criminal courts

The public prosecutor has the competence to decide whether to prosecute or to renounce from prosecution. The Dutch legal system is fairly familiar with dealing with environmental matters by transaction, settlement and dismissal. In exchange for renounce from penal prosecution the public prosecutor can make several conditions, the fulfilment of which can prevent penal prosecution. These so-called transactions generally result in the offender paying a certain amount of money that the prosecutor fixes. There is in principle no control by any other authority whether or not the decision to renounce from prosecution is right. An important legal right in this respect is given to directly interested parties. A directly interested party is defined as someone whose interest will be affected if a prosecution should be left out (Art. 12(2) of the Criminal Prosecution Act). An NGO that according to its objectives and as appears from its factual activities looks after a certain interest, when that particular interest is directly affected by the decision not to prosecute, has that same right to complain to the Court. It needs to be stressed that nature and environmental organisations are considered to be promoters of the interest of victims of environmental crimes. ‘Victims’ are those that experience disadvantage of the environmental degradation, but also the environment itself.

NGOs thus have the possibility to provoke a prosecution if the public prosecutor decides to renounce from prosecution by complaining to the Court (Art. 12(1) of the Criminal Prosecution Act). If the Court considers the complaint to be reasonable, it can order the public prosecutor to start the prosecution. The Court will turn down the complaint if the Court decides that the refusal is in the interest of the common interest.

3.5 Non-judicial procedures

Art. 9:1 of the GALA grants anyone the right to submit complaints against all acts by any public authority in a non-judicial procedure. The GALA also introduced procedural provisions as to how these complaints have to be dealt with. When the complaint has not been dealt with satisfactorily, the complainant can address either the ombudsman of the competent decentralized authority, or the National Ombudsman (Art. 9:17 GALA). The Ombudsman has the responsibility to investigate complaints that are forwarded to him concerning governmental bodies that allegedly have not acted properly towards a natural or legal person. The Ombudsman is not entitled to act if another way of legal protection is available, or has been available but not been used. Before going to the Ombudsman, the plaintiff must have tried to get things settled with the administrative authority that is involved. If mediation between the Ombudsman and the

authority fails, an inquiry will be started which will result in a written report. This report will be made public and available to all. Although only in a few environmental cases parties turned to the Ombudsman, this procedure has an important complementary role. The influence of the Ombudsman reaches even further than particular cases because his findings may be confirmed by the Minister him/herself.

4. Significance of the judiciary: some empirical data

4.1 Introduction

In 2002, a large empirical research project was carried out to find out some statistics as to court procedures in environmental cases.²⁷ Since these statistics are very helpful when assessing the significance of the judiciary in environmental governance, the most important findings of the project are presented here. Since almost all administrative environmental law cases are decided in first and only instance by the Administrative Law Division of the Council of State, data collection was focussed on this court.²⁸

4.2 Sharp decline in the number of environmental and planning cases since 1997

Since 1997, the number of cases before the Administrative Law Division of the Council of State has been in decline. The number of cases that were pending on January 1st went down from 4834 in 1997 to 2846 in 2001, to 1847 in 2002.²⁹ These are cases in which the Administrative Law Division of the Council of State decides in first and only instance. It is estimated that about 80% of these cases are related to environmental law and planning law in a 2:1 ratio. The same trend is visible with regard to the number of preliminary (suspension) procedures. The sharp decline can be largely explained by a series of changes in legislation to reduce legal procedures. The most important change is that about 75% of all installations that originally needed an environmental permit have been brought under national regulations. These installations have to comply with environmental rules laid down in an order in council. They no longer have to apply for a permit to local or regional authorities. Since for these installations, there no longer are individual decisions, there no longer exists a possibility for appeal.

In 2002, a dramatic further decline took place as a consequence of a political assassination. On 6 May 2002, the leader of a new right wing political party, Pim Fortuyn, was killed by a person who was working for an environmental NGO, *Vereniging Milieuoffensief*. This particular NGO mainly operated through court procedures against environmental permits that were issued for cattle raising installations. *Vereniging Milieuoffensief* accounted for about

²⁷ J.M. Verschuuren, 'Country Report and Case Study: The Netherlands' (annex 6a) in *Access to Justice in Environmental Matters Vol. II*, N. de Sadeleer, G. Roller and M. Dross (eds) (Brussels 2002).

²⁸ Data have been compiled using the annual reports of the Council of State and the internet database containing all important cases by Dutch district courts (at <www.rechtspraak.nl>, 10 December 2007). Case-law by the Administrative Law Division of the Council of State has been made available since April 2002. This database has been used to run the searches necessary to find the data on numbers of cases. Therefore, in addition, cases published in the various traditional sources (for instance the environmental law reviews), as well as on CD-ROMs have been studied, covering the years 1997-2002. Finally, interviews with key persons within the Administrative Law Division of the Council of State and NGOs were carried out to check the data obtained through other sources.

²⁹ Figures taken from the annual reports of the Council of State, available at the Council's website: <www.raadvanstate.nl>, 7 December 2007.

50% of all cases in this field of environmental law that were brought before the Administrative Law Division of the Council of State. The legal activities of this NGO practically came to a halt after the assassination. Other NGOs have kept quiet since the assassination as well.

At the same time, the political climate in the Netherlands has turned against environmental policy. This amplifies the decline of the number of cases brought before the Council of State. People seem to be reluctant to start court procedures on environmental issues.

A third reason for the decline in 2002 is a discussion on the effect of court procedures. NGOs feel that they often win cases on legal grounds, but that the effect of a court case won is very limited. Usually, the competent authority takes a new decision, this time without making formal mistakes, and then the plan or project goes ahead anyway. This is a consequence of the rather formal approach the Administrative Law Division usually takes. The Administrative Law Division tends to annihilate decisions because they have not been carefully prepared (e.g., without a thorough research into environmental effects), or because they are ill-motivated. When a decision has been well prepared and well motivated, administrative courts usually test it in a very marginal way.

Since 2002, the number of cases decided by the Council of State in environmental and planning matters more or less stabilized around 1800 per year.³⁰

4.3 Number of cases brought before an administrative court by NGOs and other parties

Within the environmental and planning law cases, the majority of cases is brought before the Administrative Law Division by local residents or a group of local residents (a local group), i.e., about 55% of the cases. The remainder of the cases is more or less equally shared by environmental NGOs (25%) and operators of installations (20%). Non-interested parties hardly ever address the courts (less than 1%). Combining these figures with the number of cases mentioned above leads to the conclusion that NGOs in 1997 brought 966 cases before the Administrative Law Division, diminishing to 569 cases in 2001 and 370 cases in 2002.

4.4 Civil law cases

To get an estimate of the number of civil law cases, I have used the research through the internet database mentioned above. From the 199 environmental cases initiated by NGOs found in the database, only four are civil law cases. Since civil law cases are very expensive, they often are not very successful for the NGOs, and there exists a good system of administrative procedures (see above), NGOs only rarely address the civil court. This means that about 2% of all cases brought before courts by NGOs are civil law cases. This seems to be an accurate estimate. The number is more or less constant for many years now. However, according to the lawyer of the *Stichting Natuur en Milieu*, a co-ordinating organisation for all environmental NGOs in the Netherlands, NGOs often send a summons, threatening to start a civil law suit. Usually this leads to negotiations with the company involved, without a law suit being pursued in the end.

4.5 Number of cases won and lost by NGOs and local citizen groups

According to the president of the Environmental Law Chamber of the Administrative Law Division of the Council of State this figure is not entirely representative for all NGOs. His

³⁰ In 2006, for instance, a total of 1838 cases were decided. See the 2006 annual report at p. 180.

estimate is that NGOs win between 30% and 40% of all cases, which is about the same for individual citizens or groups of local residents. Research through the database shows a slightly better result for NGOs, i.e., 50%. It was, however, pointed out that the number of cases won does not necessarily imply that the environment is better off as a consequence of the case. Very often, NGOs (like individuals or other interested parties) win a case on a formal legal aspect. The competent authority usually corrects this aspect in a new decision, and then the project goes ahead anyway. This especially is true for cases that were only partially won.

It is remarkable that the data show that some NGOs are more successful than other NGOs. Jongma and Michiels in 2002 researched the number of cases won by one specific environmental NGO, *Vereniging Milieuoffensief*, already mentioned above.³¹ This particular NGO is a non-typical NGO because it almost exclusively uses court procedures to achieve its goals. This is non-typical, because most NGOs use court procedures only as a last resort. In addition, this NGO only deals with environmental and animal welfare problems relating to bio-industry. Jongma and Michiels found out that this NGO between 1992 and 2002 initiated 2200 procedures. According to the NGO's own records, they won 80% of these cases. When looking at the cases initiated by the *Vereniging Milieuoffensief* and decided by the Administrative Law Division of the Council of State between April and November 2002, the NGO won 52% of the 50 cases that were decided. The authors conclude that the quality of decisions regarding livestock farms taken by public authorities is poor. My own research supports this conclusion. For instance, of the 68 cases by the *Vereniging Milieuoffensief* in 2002, this NGO won 34 plus an additional 6 partly won cases. They lost 26 cases, and were declared inadmissible in 2 cases. They won more than 60% of their cases. Greenpeace, on the other hand, lost 5 of its 6 cases.

For local citizen groups, the situation is radically different. Of the 199 cases studied, 37 cases were initiated by local groups. In only 7 cases these groups acted by themselves, i.e., without a regional or national NGO being a plaintiff as well. Local groups won only 30% of the cases. The latter amount goes for individually interested citizens as well.

The data make it very clear that administrative courts in the Netherlands usually only test government decisions in a very marginal way. Of the 96 cases won by NGOs and local citizen groups, a staggering 70 were won on formal grounds. This is almost 70%! The quality of appeals by NGOs is much higher than the quality of appeals by individually interested parties. According to the president of the Environmental Law Chamber of the Administrative Law Division, legal claims by NGOs usually oblige the court to go into the matter more profoundly, and therefore enhances the quality of case-law.

5. Analysis of significant court judgements of environmental relevance

5.1 Introduction

To show the relevance of individual court decisions for environmental governance in general is, from a methodological point of view, not easy to do. It will be difficult, if not impossible, to prove that a certain development or change observed in society is indeed caused by court decisions. For this contribution, I did not do the empirical research that is necessary to find the mere shreds of such evidence. What follows is a short description of two landmark cases on environmental issues in the Netherlands that, beyond doubt, were of greater significance than just the specific dispute in question. Both cases are several years old now, so the observer has

³¹ M.P. Jongma, F.C.M.A. Michiels, *supra* note 17 at 2238.

enough distance to draw some conclusions as to the possible impact of these cases. Still, the discussion below is only partly based on some empirical research by others and by the author in other projects. Therefore, the conclusions presented below should not be considered scientifically undisputable.

One case is a civil law case, the other an administrative law case. The civil law case is selected because of its great environmental relevance. However, it is a rather exceptional case. Because of the effective system of (administrative) judicial review, and because of the fact that civil procedures are very costly, the number of cases brought before a civil court by NGOs is extremely low (probably only 2% of all cases brought before a court by NGOs). Nevertheless, I have decided to select this civil law case because of the impact on environmental law. Civil environmental law cases decided by the Dutch Supreme Court, sometimes change environmental law in the Netherlands substantially, because of the fact that usually fundamental issues are at stake, and because of the authority of Supreme Court decisions. Let us, however, start with the administrative law case.

5.2 Administrative law cases on EU Habitats Directive

A landmark case as far as environmental governance is concerned is a nature conservation case that was in court for several years around the turn of the century.³² The case involved EU nature conservation law, laid down in Directive 79/409/EEC on the Protection of Wild Birds (hereinafter: Wild Birds Directive),³³ and Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (hereinafter: Habitats Directive).³⁴ The case concerned plans to construct a transboundary business park on the German/Dutch border near the cities of Heerlen and Aachen to combat regional unemployment in the area. However, the site hosted one of the last populations of the common hamster (*Cricetus cricetus*) in the Netherlands and in western Europe. This species is listed in Annex IV of the Habitats Directive, and therefore falls under the protection of Art. 12 of the Habitats Directive. As a consequence, it is prohibited to capture or kill specimens of this species, or to deteriorate or destruct breeding sites or resting places. Art. 16 of the Directive offers a way out under strict conditions.

In a series of judgments, the Administrative Law Division of the Council of State found that the competent authorities in the Netherlands had not rightfully applied the derogation clauses because they had failed to demonstrate that

- there were no satisfactory alternatives. The authorities had only assessed other possible locations for the business park. They should have also considered options for upgrading existing business parks or the possibility of creating jobs in other sectors, such as education or health care;
- the derogation was not detrimental to the maintenance of the populations of the species at a favourable conservation status in their natural range. The authorities did not show that populations dynamics data indicated the species would maintain itself on a long-term basis as a viable component of its natural habitat if the business park was constructed, nor that the natural range of the species would not be reduced as a consequence of the decision to construct the business park;

³² The most important decision being Administrative Law Division of the Council of State, 15 January 2001, (2001) Milieu en Recht 73-78.

³³ OJ L 103/1, 1979.

³⁴ OJ L 206/7, 1992.

- the derogation was necessary for an imperative reason of overriding public interest. According to the Council of State, combating regional unemployment can be an imperative reason of overriding public interest. However, in this case, the Council of State found that the authorities had used outdated unemployment figures, and, therefore, had not established that the construction of the business park was an imperative reason of overriding public interest.

This case, and several other cases that were in court in the same period, almost all dealing with EU environmental law, mostly with both nature conservation directives, received an enormous amount of media attention. The cases have had an enormous impact on all kinds of development projects all over the country. They make it very clear that the provisions of the Birds- and Habitats Directives must be very carefully applied when reaching all kinds of decisions, such as building permits, environmental permits, allowances for the construction of roads, allowances for the exploration of fossil fuels, etc.

5.3 Civil law case on EU Nitrates Directive

In July 1995, the European Commission sent a formal notice to the Netherlands for not having implemented Directive 91/676/EEC concerning the Protection of Waters against Pollution Caused by Nitrates from Agricultural Sources (hereinafter: Nitrates Directive).³⁵ In December 1997, several environmental NGOs requested the national government to take all measures necessary to implement the Nitrates Directive. One year later, in December 1998, the European Commission again sent a formal notice to the Netherlands because of poor implementation of the Directive in the pursuit of an infringement procedure against the Netherlands. In 1999, the NGOs filed a lawsuit against the Netherlands State for not having implemented the Nitrates Directive.

The NGOs requested the court to declare that the State has acted unlawful towards the NGOs by not having implemented the Directive and to sentence the State to issue measures to make sure that the goals of the Directive will be met, for instance that there will be no more than 50mg of nitrates in groundwater and surface waters.

The District Court of The Hague first dealt with the question whether the NGOs have the power to address this issue to the Court.³⁶ The State had argued for inadmissibility of the NGOs. However, according to the Court, the claims of the NGOs were admissible. The NGOs fall under the scope of Art. 3:305a(2) of the Dutch Civil Code. They are legal associations that have as their objective the protection of the environment. The fact that the NGOs have been discussing the implementation of the Nitrates Directive with the government for many years, shows that these NGOs also have a specific interest in the implementation of this Directive. Both their statutory objectives and their actions in practice show that they have an interest as defined under Art. 3:305a of the Civil Code.

Secondly, the Court rejects the State's argument that the Court is not competent to address this case because the European Commission has initiated an infraction procedure against the Netherlands. According to the State, the District Court has to wait until the European Court of Justice (hereinafter: ECJ) has rendered its decision in this case to prevent contradictory decisions on the same case. However, the Dutch District Court finds that the Commission did not (yet) refer the case to the ECJ.

³⁵ OJ L 375/1, 1991.

³⁶ District Court The Hague, 24 November 1999, (2000) 27 Milieu en Recht 63-67.

The third question dealt with, is the question whether the Nitrates Directive has direct effect.³⁷ According to the Court this is the case. The obligations laid down in the Directive, such as the obligation to achieve a limit value of 50mg nitrate in groundwater, are very specific and clear. Since the State admitted that it cannot guarantee that this objective has been/will be met on time, the Court concludes that the Directive has taken direct effect and that the State did not comply with the provisions of the Directive. Thus, the Court established that the Netherlands State acts unlawful against the NGOs by not guaranteeing that the objectives of the Nitrates Directive are met. The NGOs had brought forward other arguments as well (such as the argument that failure to implement the Directive also is contrary to the precautionary principle and the principle of sustainable development), but these arguments were rejected by the Court.

The final question dealt with by the Court is whether the Court can order the State to implement the Directive since this *de facto* implicates that it orders the legislature to establish acts and regulations. The State argued that such an order infringes the separation of powers. The Court rejects this argument. According to the Court, the State will only be ordered to end the unlawful act. The State can choose its own means to do so.

The Netherlands State appealed this decision with the Court of Appeal. In its decision of 2 August 2001, the higher court overturned the decision of the District Court.³⁸ The Court of Appeal has two arguments to overturn the decision. The Court of Appeal thinks it is undesirable for national courts to interfere with similar cases during an infraction case that is pending before the ECJ (on 28 August 2000, the European Commission had referred the nitrates case against the Netherlands to the ECJ). This may lead to conflicting judgements. National courts should abstain from giving a decision until the ECJ has given its judgement, according to the Court of Appeal. The Court of Appeal also agrees with the State's argument that the order to ascertain the goals of the Directive, implies that the current Animal Manure Act has to be amended or that new legislation has to be established. However, in the Netherlands the legislature decides whether or not, and within what timeframe, new legislation is to be established. Courts do not have the power to interfere with the legislature as a consequence of the principle of the division of powers.

The NGOs then referred the case to the Dutch Supreme Court. The Dutch Supreme Court gave its view on the case on 21 March 2003.³⁹ In its judgment, the Supreme Court follows the Court of Appeal's decision. According to the Supreme Court, national courts indeed are not allowed to force the State to enact legislation implementing EU law. It is a political decision whether or not to implement an EU Directive, in which the (national) judiciary cannot interfere. The Supreme Court does not refer to Art. 10 of the EC-Treaty, although the NGOs argued that this Article does not allow a Member State to decide *not* to implement a Directive. The Supreme Court argues that this point of view does not limit the rights of citizens, because individual citizens still can, in administrative procedures, invoke provisions that have direct effect. The Supreme Court ends its judgment by stating that the ECJ, in an infraction procedure, *can* force the State to enact legislation. Since this has been regulated in the EC-Treaty, there is no need for national courts to do the same. As already stated, an infringement procedure against the Netherlands for not having implemented the Nitrates Directive was at the time of this national procedure in a well advanced stage. In October 2003, the ECJ condemned the Netherlands for

³⁷ Only when a directive has direct effect does it confer rights on individuals, see J.H. Jans, *European Environmental Law* (2nd edn, Groningen, Europa Law Publishing, 2000), pp. 173-220.

³⁸ Court of Appeal The Hague, 2 August 2001, (2001) *Milieu en Recht* 258-261.

³⁹ Netherlands Supreme Court, 21 March 2003, (2003) *Milieu en Recht* 314-315.

not having implemented the Nitrates Directive. In its decision, the Court made it perfectly clear that the Dutch policy with regard to animal manure was totally inadequate to fulfil the obligations laid down in the directive.⁴⁰

The environmental effectiveness of this case has been limited because of the judgement of the Court of Appeal. Since the Supreme Court takes the same position as the Court of Appeal, NGOs do not have a powerful new weapon to force authorities to implement EU directives. This finding will be further discussed in the next section below.

6. Critical survey of the judiciary's contribution to environmental governance

The Netherlands had a liberal system of access to justice in environmental matters. Over the years, this system has been gradually reduced to the minimum requirements of the Aarhus Convention. By bringing installations under the obligation to follow orders in council rather than having them apply for an individual permit, a great deal of cases no longer can be brought before courts. In 2004, this development is followed by the abolishment of the *actio popularis*. Especially the first development caused an enormous decline in the number of cases. The abolishment of the *actio popularis* will not lead to a further reduction of cases, because non-interested parties account for less than 1% of all cases. NGOs win about 40-50% of the cases. This is higher than groups of local residents that win about 30% of the cases. The latter amount goes for individually interested citizens as well. From the cases won, only 30% was won on substantive grounds. The quality of appeals by NGOs is higher than the quality of appeals by individually interested parties. Legal claims by NGOs usually oblige the court to go into the matter more profoundly, and therefore enhance the quality of case-law.

In addition, administrative courts tend to only marginally test government decisions, leaving them as much room as possible to, within the limits of the law, set their own policies. Civil courts do the same, as was shown by the second case discussed above. This case also shows that civil law altogether does not provide powerful instruments to NGOs or local residents combating environmental degradation, even in cases where EU environmental law is at stake. In the District Court's view in this case, NGOs should also have the possibility to initiate a procedure under civil law to generally order the State to implement an EU Directive. Obviously, the threat of such civil law procedures may force the authorities to seriously and timely take EU law obligations into account. Unfortunately, this view was rejected in appeal. The Court of Appeal's judgement has been heavily criticised on both its arguments, not only by the NGOs, but also in literature. It has been pointed out that under EU law national courts have the obligation to apply provisions of Directives that take direct effect. They cannot ignore EU law simply because the European Commission has started an infraction procedure against the member state in question.⁴¹ Tort procedures under national law are of a totally different nature than infraction procedures at the EU level. Moreover, adopting the view that courts cannot interfere with the legislative process, not only implies that the State is allowed to act unlawfully vis-à-vis these NGOs, but also that the Nitrates Directive (or any other Directive) has no real effect within the national legal system. It is clear that these questions are important ones. They deal with fundamental issues concerning the division of powers and concerning the role of EU law. Like in many other cases before, both in administrative and in civil law, NGOs often bring forward such fundamental legal issues.

⁴⁰ *EC Commission v. The Netherlands*, Case No. C-322/00 [2003] ECR I-11267.

⁴¹ J.H. Jans and J. Verschuuren, case law note with District Court The Hague, 24 November 1999, *supra* n. 28 at 67.

The case also shows the ‘democratic’ aspects that often can be heard in discussions on access to justice. The State argues that the legislature has the power to put in place a set of rules governing the behaviour of farmers, not the judiciary. It is the legislature that has to transpose the provisions of EU Directives into national law, not the judiciary. The State argues that NGOs should not have the power to go to a civil court in a tort procedure to force the State to take actions to implement EU law. Implementing EU law is up to democratic institutions, such as the legislature. NGOs should interfere in this process through their regular political influence, not through court procedures. NGOs take the opposite position. In their view, the State acts illegally by not transposing the Directive. The duty to implement this Directive is a legal duty that follows from the EU Treaty. NGOs simply try to make sure that public authorities observe the law.

As discussed above, the main argument against access to justice for a large number of people (including NGOs) stems from a socio-economic viewpoint. It is argued that it has become too easy to obstruct socially desirable projects by going to court. Relating to the case of the Nitrates Directive, the court’s order to impose the strict objectives of the Nitrates Directive would have had a lot of consequences for agriculture in the Netherlands. As shown above, this was later reversed by the Court of Appeal and the Supreme Court. However, now the ECJ has condemned the Netherlands for not having adequately implemented the Nitrates Directive, the socio-economic effect is even bigger. The Minister for Agriculture had to withdraw the current policy and legislation and had to create a new policy that is in line with the Directive. So in the end, EU law did have an impact here, not through national courts, but through the ECJ.

How different is the first case, a case before administrative courts. The first case discussed above (on the hamster and the EU Habitats Directive), does show the direct impact of administrative court decisions dealing with EU law on environmental governance. The importance of this case cannot be overestimated. Although most EU environmental law saw a slow start in the EU member states, national cases like these, make a big difference. Cases like the one discussed above made all actors involved realize that the Habitats Directive is not only an important instrument to direct means for the conservation of biodiversity, but also to provide constraints (of varying degrees) on decision-making for projects that may harm biodiversity. Because of the persistence of the European Commission, which continues to institute infringement procedures against EU Member States for failure to fulfil obligations under the Wild Birds and Habitats Directives, but especially because of the willingness of national courts, at least in the Netherlands, to test projects against the provisions of the Directives, the impact of EU environmental law on decision-making has increased enormously. Since 2000, a similar development took place with regard to EU air quality law. It is expected that recent EU water law will receive a similar strict treatment by courts in the Netherlands. Dutch courts consider the duty to strictly and carefully follow EU law to be very important and are willing to seriously test government decisions against EU law. Since EU environmental law nowadays covers almost the entire field of environmental policy, this approach has had an enormous impact on environmental governance in the Netherlands.⁴²

⁴² It must be noted, however, that this certainly is not the case throughout the EU. There still are countries in which courts do not take EU law very seriously. As is apparent from the above discussion, this has consequences for the level of implementation of EU law into national legal practice. This conclusion also follows from a comparative study into the implementation of EU air quality Directives in several member state, see R.B.A. Koelemeijer, Ch.W. Backes, W.F. Blom, A.A. Bouwman and P. Hammingh, *Consequences of EU Air Quality Directives for Spatial Development Plans in Various EU Countries* (Netherlands Environmental Assessment Agency, 2005) available at

Non-governmental organisations have successfully seized the opportunities offered by the EU Directives to go to court to combat the loss of biodiversity and to bring forward other environmental issues. Initially, they were very successful. The reason for the initial success of NGOs is simple: administrations were not accustomed to providing the amount of data, and legal arguments, that are now needed before a project that harms the environment can be approved, for instance under the Habitats Directive. Courts tend to find administrative decisions inadequate, when the authorities are not able to present sufficient data. However, authorities, as well as developers now recognise that they need to develop their plans so as not to deteriorate for instance protected areas or harm populations of endangered species. Their efforts must be applauded. As a consequence, it can be concluded that governmental decision-making has become better informed and thus of a higher quality.

Another consequence, at least as far as decision-making with regard to the EU Wild Birds and Habitats Directives is concerned, is that large projects more and more are negotiated by all parties involved, including environmental NGOs, looking into biodiversity protection for an entire region in an integrated fashion, and drawing up restoration plans to restore lost habitats. The fact that NGOs are backed up by court decisions gives them a strong position in such processes of cooperative governance.⁴³

7. The way forward

Courts in the Netherlands are often criticised for their decisions in environmental cases. Business organisations and local authorities often feel that courts go too far in testing government decisions, whereas NGOs and local residents think courts test decisions too marginally, leaving too much room for the authorities. The political discussions leading to the abolishment of the *actio popularis* show that a liberal system of access to justice no longer is a Dutch trademark. Hence, courts are trying to balance between these opposite positions. They do test government decisions rather marginally, and will probably continue to do so. This is in line with Dutch legal and administrative culture. Negotiations and talks between the various actors involved are firmly embedded in daily legal and administrative practices. However, courts do test the legality of the decisions reached by the authorities. Since there exists EU law on practically every environmental topic, such a test often results in testing decisions against EU law. Hence, courts – indirectly – promote the implementation of EU environmental law in legal practice. They thus help develop a level playing field for businesses and a high level of protection of the environment in the EU.

<www.mnp.nl/en/publications/2005/Consequences_of_EU_air_quality_directives_for_spatial_development_plans_in_various_EU_countries.html>, 7 December 2007.

⁴³ See for more examples backing this conclusion W. Snape III, M. Senatore, K. Gillon, K., S. George, C. Muffett, R. Anderson and R. Kondor, 'Protecting Ecosystems under the Endangered Species Act: the Sonoran Desert Example' (2001) 41 *Washburn Law Journal*, 14-49, and more recently J. Verschuuren, 'Legal Pluralism, Co-operative Governance, and International Law. The Case of Transboundary Wetlands Under the Ramsar Convention: Keep the Lawyers Out!' (2008) 19 *Colorado Journal of International Environmental Law and Policy* [in print].